

APPEAL NO. 033014
FILED DECEMBER 23, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 17, 2003. With respect to the single issue before him, the hearing officer determined that the respondent (claimant) had good cause for failing to attend the June 2, 2003, designated doctor examination and, as a result, the appellant (carrier) is not entitled to suspend temporary income benefits (TIBs) between the date of that examination and the date the claimant attended a designated doctor examination on September 26, 2003. In its appeal, the carrier argues that the hearing officer erred in determining that the claimant had good cause for failing to attend the designated doctor examination because the Texas Workers' Compensation Commission (Commission) did not set the appointment within the time frame for such appointments established in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(d)(1) (Rule 130.5(d)(1)). The appeal file does not contain a response to the carrier's appeal from the claimant.

DECISION

Reversed and a new decision rendered.

The facts of this case are largely undisputed. The parties stipulated that the claimant sustained a compensable injury on _____. The claimant moves frequently because her husband has to travel from job site to job site. At the time of her injury, the claimant lived in Texas (city 1). She had an appointment with a designated doctor in city 1 and he determined that she had not yet reached maximum medical improvement (MMI). In March or April 2003, the claimant moved from city 1 to Texas (city 2). In late May 2003, the claimant moved for a couple of weeks to Texas (city 3), as a stop over on the way to Texas (city 4). In an order dated May 20, 2003, the Commission ordered the claimant to attend a designated doctor examination with Dr. L in city 2 on June 2, 2003. The claimant did not attend that appointment. On September 26, 2003, the claimant attended a designated doctor appointment in city 4.

At issue in this case is whether the claimant had good cause for failing to attend the designated doctor appointment on June 2, 2003, in city 2. The claimant contended at the hearing that she did not attend the appointment because she did not receive the notice setting the appointment. The hearing officer rejected that argument and in an unappealed factual finding determined that the claimant "had constructive knowledge of the Commission's May 20, 2003, order no later than May 27, 2003." The hearing officer nevertheless determined that the claimant had good cause for failing to attend the June 2, 2003, designated doctor appointment because the Commission did not comply with Rule 130.5(d)(1) in setting the appointment. In relevant part, Rule 130.5(d)(1) provides:

The commission, within 10 days of receipt of a valid request, shall issue a written order assigning a designated doctor; set up a designated doctor appointment for a date *no earlier than 14 days, but no later than 21 days*

from the date of the commission order; and notify the employee and the carrier that the designated doctor will be directed to examine the employee. (Emphasis added.)

Rule 130.6(c) provides that a carrier “may suspend [TIBs] if an employee, without good cause, fails to attend a designated doctor examination.”

In this instance, the Commission order appointing the designated doctor is dated May 20, 2003, and the appointment is set for June 2, 2003, 13 days later. Thus, there is no question that the appointment was not set within the timeframe established in Rule 130.5(d)(1) and the issue becomes one of determining the effect of the Commission’s failure to follow the rule in setting the appointment. The hearing officer stated:

I strictly construe this rule and find that the provisions for suspension of [TIBs] pursuant to Rule 130.6(c) cannot be invoked. The failure to set the appointment date no earlier than 14 days from the date of the order constituted good cause for the Claimant’s failure to attend the appointment.

We cannot agree that the Commission’s noncompliance with Rule 130.5(d)(1) in setting the designated doctor appointment automatically establishes good cause for the claimant’s failure to attend that appointment. There may be circumstances where noncompliance with the rule would support a determination of good cause for the failure to attend the appointment, particularly where there is some connection argued between the failure on the part of the Commission to comply with the requirement that the appointment be no earlier than 14 days and no later than 21 days from the date of the order and the claimant’s nonattendance. But, in this case, the claimant testified that she did not attend the designated doctor appointment because she did not receive notice of the appointment and the hearing officer rejected that testimony. The claimant did not argue that she was unable to attend because she received late notice of appointment such that she could not comply with the order. Under these circumstances, we believe that the hearing officer erred in finding good cause for the claimant’s failure to attend the designated doctor appointment. The orderly administration of the designated doctor process requires compliance with Commission orders. Where, as here, there is a technical defect in the order, the order must nevertheless be followed. It is only if the defect is of such a nature that compliance would work a hardship on the claimant that good cause could be established. That was not shown in this case and, as such, the hearing officer erred in excusing the claimant’s failure to attend the designated doctor appointment. Thus, we reverse the determination that the claimant had good cause for her failure to attend the June 2, 2003, appointment with the designated doctor and render a new decision that the claimant did not have good cause for failing to attend that appointment. Accordingly, we also render a new determination that, pursuant to Rule 130.6(c), the carrier is entitled to suspend TIBs from June 2 to September 25, 2003, because the claimant attended a designated doctor examination on September 26, 2003. See Rule 130.6(c)(2).

The hearing officer's decision and order are reversed and a new decision rendered that the claimant did not have good cause for failing to attend the designated doctor appointment on June 2, 2003, and that the carrier is, therefore, permitted to suspend TIBs from June 2 to September 25, 2003.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**LEO MALO
ZURICH NORTH AMERICA
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Thomas A. Knapp
Appeals Judge